

*UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
CLARKSON S. FISHER FEDERAL BUILDING
UNITED STATES COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608*

KATHRYN C. FERGUSON, USBJ

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November 24, 2010

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Re: Solomon Dwek
Case No. 07-11757

Charles A. Stanziale, Jr. vs. Joseph Kohen
Adversary No. 08-2205

Evelyn Safdieh Deposition

Counselors:

The trustee (plaintiff) seeks leave of the court to introduce into the record several designations from the deposition of non-party Ms. Evelyn Safdieh on the basis that Ms. Safdieh is an unavailable witness under Federal Rule of Civil Procedure 32(a)(4). The defendant opposes the motion because the information sought to be introduced is hearsay. The process server provided an affidavit to the court, explaining that he attempted to serve the witness on six

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separate occasions: 10/22/10 at 7:30 a.m., 10/23/10 at 8:35 p.m., 10/25/10 at 6:45 p.m., 10/26/10 at 6:05 p.m., 10/28/10 at 6:23 p.m., and 11/2/10 at 10:43 a.m. The trial was scheduled to commence on November 1, 2010.

The use of deposition in adversary proceedings is governed by Federal Rule of Bankruptcy 7032, which directs that Federal Rule of Civil Procedure 32 applies in adversary proceedings. If a witness is unavailable, “[a] party may use for any purpose the deposition of a witness whether or not a party, if the court finds: (D) that the party offering the deposition could not procure the witness's attendance by subpoena.” Fed. R. Civ. P. 32(a)(4)(D). This is the provision under which the Trustee requests the court to admit the designations from the prior deposition of the witness. “Implicit in this rule is an obligation to use reasonable diligence to secure the witness's presence, and the district court has broad discretion to determine whether the proponent has satisfied this requirement.” Thomas v. Cook County Sheriff's Dep't, 588 F.3d 445, 458 (7th Cir. 2009)(citing Griman v. Makousky, 76 F.3d 151, 154 (7th Cir. 1996)). “The burden of showing the witness's unavailability... rests with the party seeking to introduce the deposition.” Collins v. Omega Flex, Inc., 2010 U.S. Dist. LEXIS 59182 (E.D. Pa. June 15, 2010)(citing Chao v. Tyson Foods, Inc., 255 F.R.D. 560, 561 (N.D. Ala. 2009) (quoting Jauch v. Corley, 830 F.2d 47, 50 (5th Cir. 1987))). In Collins, the court found that the mere assertion that the witness was unavailable by the party seeking to introduce a prior deposition under Rule 32(a)(4)(D) was inadequate to show the witnesses unavailability. Id. This may be contrasted with Thomas, where the party seeking to introduce testimony from a former deposition successfully demonstrated a witnesses was unavailable by showing “[a]fter two subpoenas, a

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show cause order, numerous phone calls, and a search by a private investigator” the moving party could not get the witness into court to testify. Thomas at 458-459.

The trustee attempted to serve the witness with a subpoena to appear by using a process server on six different occasions. The process server explained in his affidavit to the court that “on all the attempts there was no answer, she [the witness] had her attorney call me [the process server] asking me questions, but she would refuse to open the door. I feel that the defendant is evading service.” The witness in question, Ms. Evelyn Safdieh, is the mother-in-law of the defendant in the instant adversary proceeding, Mr. Joseph Kohen. Therefore, it is improbable that the witness was unaware that her testimony was sought for trial. This fact combined with the inquiries from the witness’s attorney to the process server makes it probable that the witness was evading service by making herself unavailable. The Trustee used reasonable diligence in seeking to procure Ms. Safdieh’s testimony at trial by attempting to serve her with a subpoena on six separate occasions at different times of day. Accordingly, the court grants the trustee’s motion to introduce into the record the requested designations from the deposition of Ms. Evelyn Safdieh.

/s/ Kathryn C. Ferguson
KATHRYN C. FERGUSON
US Bankruptcy Judge